

HON. RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ARCH INSURANCE COMPANY,

Plaintiff,

v.

SCOTTSDALE INSURANCE COMPANY, a  
foreign corporation; and NORTHWEST  
TOWER CRANE, a Washington corporation,

Defendants.

NO: C09-0602 RSM

DECLARATION OF MARK J. DYNAN IN  
SUPPORT OF ARCH INSURANCE  
COMPANY'S MEMORANDUM IN  
RESPONSE TO SCOTTSDALE INSURANCE  
COMPANY'S MOTION FOR PARTIAL  
SUMMARY JUDGMENT

Noted on Motion Calendar:  
July 30, 2010

I, MARK J. DYNAN, do here by declare:

1. I am over the age of eighteen years and otherwise competent to testify herein. I am making these statements based on my personal knowledge. I am a member of the Washington State Bar and have been since October, 1981. I have tried to verdict over 100 jury trials in both State and Federal courts in addition to multiple varieties of arbitrations and administrative hearings as well. My background starts at the Attorney General's Office for the

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RESPONSE TO SCOTTSDALE MOTION FOR  
SUMMARY JUDGMENT - 1

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1 State of Washington, proceeds to a large firm in Tacoma – Eisenhower Carlson where I  
 2 represented corporations such as Weyerhaeuser, Exxon, Asarco, and Dupont. These all involved  
 3 multiple complicated litigation in which I was either lead attorney or second chair. After that  
 4 time I worked in the area of insurance defense, doing multiple cases for State Farm, Allstate and  
 5 other insurance companies including AIG and Arch. My current cases involve everything from a  
 6 small auto accident to complex litigations such as the case of the crane failure.

7  
 8 2. I have reviewed the declaration of Thomas Fitzpatrick along with Attachments A  
 9 and B and the reports from Mr. Fitzpatrick and Mr. Talmadge. I am going to try to educate both  
 10 the court and counsel as to the complexity of this case to help the court to understand the amount  
 11 of fees and the reason for these fees. I will not go into the minutiae of one single bill but rather  
 12 stay with the broader subjects raised by Mr. Fitzpatrick. Further, I do not have a numbered set of  
 13 discovery documents, so I cannot decipher the referenced billing entries and am unable to  
 14 respond to specific entries without more information. (I would note that the “Margaritaville” bill  
 15 was probably an error as I do not recall going to Las Vegas in this case.)

16  
 17 3. The best description of this case is found in Attachments A and B to this  
 18 declaration which are the Statement of Facts utilized by Northwest Tower Crane’s attorneys in  
 19 Motions for Summary Judgment. As can be seen, there were multiple witnesses as well as  
 20 multiple depositions during a one year period. In fact, while Northwest Tower Crane (“NWTC”)  
 21 says there were approximately 80, I believe the number was closer to 90. That began just after  
 22 litigation was started and also involved dealing with the L&I issue which will be explained  
 23 below. The number of parties involved at times ranged up to 22 named parties, depending upon

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1 the number of subcontractors that were involved in this case at one time and how many attorneys  
 2 represented each party. Most of the parties had more than one firm representing them. To date  
 3 there have been 584 pleadings filed in the consolidated State matter.

4 4. Shortly after the crane fell, Lease Crutcher Lewis ("LCL") first notified its own  
 5 attorneys Groff Murphy, PLLC ("Groff Murphy") and they wisely chose to contact Stafford Frey  
 6 Cooper ("Stafford Frey") immediately. Stafford Frey was hired by AIG's Complex Litigation  
 7 Division pursuant to AIG's excess policy, which was likely to be triggered given the death of  
 8 Mr. Ammon and the amount of property damage. The necessity of obtaining and preserving  
 9 evidence immediately after the accident was crucial due to the core question of liability in this  
 10 matter. Groff Murphy along with Stafford Frey immediately set about gathering experts as well  
 11 as retaining evidence to avoid any spoliation complaints. Our firm was first notified of this work  
 12 in early January of 2007, about two months after the accident. Even though the first complaint  
 13 had yet to be filed, we were contacted at that time by Arch, which was on notice of potential  
 14 claims against LCL, to defend LCL.

15 5. Since I was coming into the case a might late, the agreement with Arch was that  
 16 any experts that the client, through personal counsel or Stafford Frey, had already hired were  
 17 going to continue to remain on the case with the ability to hire additional experts as needed. I  
 18 immediately was in contact with personal counsel for the client as well as Stafford Frey attorneys  
 19 to coordinate efforts. It was made clear to me by Arch that I was to work independent of those  
 20 counsel since there appeared to be some concern by Arch about information flowing freely to  
 21 them to keep track of this case and be able to adjust it properly. Therefore, I was requested to  
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1 attend all depositions and work in all areas as additional counsel for LCL to protect the client and  
 2 have an independent view to report to Arch to ensure that the client was being properly  
 3 represented. I asked Mr. Groff to release Arch from its duty to defend on February 8, 2007,  
 4 since Stafford Frey was doing the job. He insisted on behalf of the client that Arch continue to  
 5 defend LCL with Stafford Frey acting as lead counsel and my participation as part of the "team."  
 6 In response to my request, Mr. Groff reminded me of the duty of Arch to provide a defense. One  
 7 of the concerns was that the client's personal counsel was already indicating that LCL may have  
 8 its own claim, independent of the claims of the other potential plaintiffs and that there appeared  
 9 at times that personal counsel was working in the best interests of LCL's claim as opposed to the  
 10 defense of the client from the other claims. To help alleviate that potential conflict, I was asked  
 11 to act as defense counsel only for the client. In order to defend my client I needed to know every  
 12 aspect of the case. This included responding to coverage counsel's questions for facts.

14 6. The work pre-suit was an immediate attempt to settle this matter prior to litigation  
 15 and keep costs down as much as possible. While experts had been retained, including experts  
 16 across the country regarding steel structures and engineering as well as just experts on crane  
 17 operation, the parties were already gathering in an attempt to reach a settlement of the main  
 18 claims that potentially could rise to as much as \$25 million. The original two or three meetings  
 19 of potential responsible parties ("PRP") were going well until Scottsdale changed defense  
 20 attorneys for NWTC. Mr. Scheer was appointed counsel for NWTC. He entered into a meeting  
 21 (about the third or fourth of the PRP meetings that were being held) and was adamant that  
 22 settlement was not something they would even consider and that this case should be taken to  
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trial. It was later learned that Mr. Scheer sent a letter back to his client and Scottsdale indicating that he felt there was no liability on the part of NWTC and that they would easily get out in an early motion and thus recommending not settling this matter. So Scottsdale was well aware that they were hindering efforts to settle the case early. Other subcontractors, while having little or nothing to do with liability, were interested merely in paying some minimal amount to add to the pot to resolve this matter and all of the other attorneys were perplexed by Scottsdale's position in this matter. Thus, for over a year we continued to try to negotiate amongst the PRPs, as well as with plaintiffs, in trying to establish some way to divvy up the liability issue within reason, as well as negotiate reasonable settlements with the plaintiffs. These negotiations in my opinion fell apart primarily because of the obstinacy of Scottsdale acting through Mr. Scheer. It was unfortunate that this matter could not be resolved within the first year when clearly there were non-fault plaintiffs, such as the decedent and the building owners that surrounded the area. This attempt to resolve the case early even included hiring a mediator to act as master over objections and evidence rulings to assist the parties in reaching some sort of resolution. In the meanwhile, experts were required to test the metal and review all of the engineering documents to prepare for questions regarding liability. Again, all of these attempts were an effort to resolve this matter short of litigation but were thwarted in main part by NWTC and Scottsdale's insured.

7. At some point, approximately a year after the incident, the plaintiffs became tired of being unable to get a consensus of the possible defendants and thus the suits were filed beginning with the Ammon suit on or about October 4, 2007, or almost 11 months after the crane

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1 collapse. At that point, cross claims were prepared and further experts were acquired as well as  
 2 the need for more research into the area.

3 8. After the crane incident, the Washington Department of Labor & Industries had  
 4 made a large public announcement that they were going to cite both LCL as well as MKA for  
 5 their parts in this failure. If these citations had gone to hearing and been upheld, they had the  
 6 potential for allowing the plaintiffs to utilize that information to prove liability without  
 7 presenting any experts. In order to avoid the presumption of liability by utilizing the  
 8 Department's Order, these citations were fought. However, it should be noted that I took a  
 9 different tack than did MKA on how to handle that. I, having been formally an Assistant  
 10 Attorney General for the Department of Labor & Industries, and having worked directly for the  
 11 Director of L&I in the past, knew the current Director and had open communications with him.  
 12 Working with the Department took an extensive amount of time as well as working with the  
 13 Assistant Attorney Generals involved in the MKA case. MKA in the alternative decided to  
 14 appeal the case to the Board of Industrial Insurance Appeals immediately and requested hearings.  
 15 This allowed a year of free discovery by everyone since all of the same witnesses were called in  
 16 the L&I case as would be utilized in the State cases. Not only were the L&I citations a danger to  
 17 my client but the MKA hearings provided extra information from witnesses that I may not  
 18 otherwise have been able to talk to without formal deposition. Eventually I was able to reach a  
 19 resolution with the Department of Labor & Industries and we entered into an Order on  
 20 Agreement of Parties that basically came to an "Alford" plea. This prevented the initial L&I  
 21 citations on LCL's part to be utilized in any further hearings.  
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9. There is a question about payments to other firms and payment to Stafford Frey of approximately \$60,000. It should be noted that Stafford Frey was responsible for procuring the storage area immediately for the crane, which, if one thinks about it, is not an easy task to find storage for 200 feet of crane pieces. Those payments were taken on by Stafford Frey with the expectation that they would be repaid by whichever insurance company was responsible. As Arch is the primary insurer vis-à-vis AIG, it was decided that they were responsible and they had to pay Stafford Frey for those expenses. There is also a question of Navigant's expenses. Navigant has handled all e-discovery. It had to be explained to Arch what e-discovery was and the importance in this case because of the numerous computers that held information in this matter. Keep in mind that this is a large multi-million dollar project and each member of the contracting team, supervisors, project managers, engineers and designers had their own laptop as well as multiple servers devoted to the project. Thus, Navigant had to go through all of those servers to protect all the e-discoverable material and sort it out. Once all of that was explained, Arch was accepting of that bill. As far as the Tsongas bill, it was requested by both Arch and AIG that due to the expense and potential for liability which could total over \$25 million, that this case should be presented to a focus group to test out our trial theories. Those focus groups were held on one day with multiple groups, both morning and afternoon sessions, which did prove to be a great benefit to the client in how to present the case to a jury. At the time those bills were incurred, it was clear that this case was going to jury due mostly to the efforts of Scottsdale being obstinate in frustrating a settlement resolution. The bills to Hillis Clark for mediation were agreed to by all of the parties with the disclosure agreement executed ahead of

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1 time that they had also done work and retained counsel for LCL in other matters. All counsel  
 2 were made aware of that and agreed to splitting those fees. I do not believe that Arch is seeking  
 3 reimbursement for any fees other than the mediation fees as pointed out in the report. The check  
 4 to Cozen O'Connor is the settlement check paid by Arch. The settlement to the Cozen firm, who  
 5 represented one of the plaintiffs, was well over \$1 million and thus it was decided to utilize the  
 6 bulk of the Arch policy to pay that particular settlement. That was also a requirement in the  
 7 settlement that this settlement be paid quicker than AIG was willing to pay or any of the other  
 8 parties.  
 9

10 10. The issue of emails has come up. This was a constant concern for me as I was  
 11 required to keep in touch with the client, the company, as well as numerous other attorneys. In a  
 12 case as complex as this, communication and coordination, as well as keeping track of what is  
 13 going on to effectively represent your client, is mandatory. Often, if I did not respond to an  
 14 email within a short time, I would get a second email requesting a response. Oftentimes,  
 15 Mr. Groff would send me an email asking questions and, if I did not respond to it, he would have  
 16 Bill Lewis send me an email within hours asking the same question. Therefore, it was important  
 17 that every time I could, to stop, take the time to read whatever email was sent to me and then  
 18 respond to that email, which depending upon the questions took time to respond to those  
 19 questions. This meant interrupting whatever else I was doing and devoting my attention to the  
 20 email for a period of time. In accord with billing guidelines I would bill my time at one-tenth of  
 21 an hour. That was reasonable given the interruption, review, and determining a response. As  
 22 was noted in the report, I was doing individual emails as Arch had a rule against block billing.  
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1 Ms. Gold finally called me and said that she was unhappy with these email billings and then  
 2 requested that I do a block billing. She further indicated to me that she thought that I would just  
 3 sit at the end of the day and review all of my emails. I indicated to her that this was impossible  
 4 to just look at emails at one time, but we complied with her request to block bill. It has been  
 5 complained that I billed with too much precision, however it was required by billing guidelines.  
 6 It was important to respond to those emails to answer questions about availability not only for  
 7 meetings with other attorneys but meeting with the client that needed to be responded to. These  
 8 emails not only included times for these meetings but also other issues and discussion of  
 9 itineraries for those meetings. It should be noted that there were approximately 20,000 emails by  
 10 the time this case went to trial. I am sure the court can appreciate from just the sheer volume of  
 11 these emails that it was time consuming, but all of this was of benefit to the client in coordinating  
 12 the defense of the client.  
 13

14 11. There was concern about a trip to Houston, Texas for a witness deposition. This  
 15 witness was a former LCL employee who was on the premises at the time and needed  
 16 representation and she was being deposed by the Department of Labor & Industries. This was a  
 17 perpetuation deposition by the Department, which could later be used by any party later and  
 18 required my presence with the witness prior to the deposition. Therefore, my personal travel to  
 19 Houston to be present with my witness was deemed necessary and approved by the company  
 20 ahead of time. There were two assistant attorney generals that traveled to Texas as well for that  
 21 deposition as I recall and they were physically present at the deposition. I am not comfortable in  
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 26 DECLARATION OF MARK J. DYNAN IN  
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1 my professional opinion in my 29 years of experience in handling witnesses to have my own  
2 witness deposed without me being personally present.

3 12. There was also concern about my paralegal's charges. A paralegal, when  
4 properly utilized as in this case because of the over 30,000 documents, the amount of electronic  
5 materials disclosed as well as the number of witnesses and scheduling, and the pleadings being  
6 filed, all of her work in coordinating and handling such efforts was necessary. It should be  
7 pointed out that a lot of the pleadings were generated by Scottsdale's attorney for NWTC with  
8 multiple motions, in fact their motion for summary judgment to be dismissed was brought four  
9 separate times in this consolidated case before they finally won on the first day of trial. That was  
10 just one of many motions filed by Scheer & Zehnder that helped increase the number of hours  
11 spent on this case. Many of the motions, included sub-motions to file oversize briefs, etc., thus  
12 creating even more work.

14 13. I would point out that any bill that I submitted to Arch under \$25,000 was  
15 reviewed by Mr. Phillips. I know that from my personal knowledge in that he would call me on  
16 occasion and ask me about something on each of those bills. It was company policy that any bill  
17 over \$25,000 would be reviewed by Marci Gold, who — as I described to her in one  
18 conversation — appeared to be the person you would think was the old guy with the green  
19 shades and the armband. I am afraid she may have taken some offense to that comment, but she  
20 admitted that this was accurate and that was her role in the company. She and I have worked  
21 together in resolving some of the billing issues.

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DECLARATION OF MARK J. DYNAN IN  
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14. Due to the number of witnesses, who took the deposition of which witness was divided up so only one attorney for LCL would be speaking per court rules. Since the case was so complex from multiple facts and legal issues, Stafford Frey and I used each other as backup to ensure everything was covered. At times my associate, Mr. Bowman, a new lawyer but with an Engineering Degree from West Point, would accompany me with prior approval of the company. This would be because he had better knowledge of parts of the case, but not my experience in the courtroom. I did travel from Tacoma where I live as was asked to work on this based upon my experience. We do not maintain staff in Seattle, but have an office for our use.

15. My rates in this case were \$175.00 and for the associate it was \$165.00 and the paralegal rate was \$90.00. These rates are more than reasonable compared to the other lawyers involved in the case. It is my understanding that Stafford Frey was charging \$225 to \$250 just for the associates they had working on this case, who had far less experience than I did, and Ms. Bremner and Mr. Buck were charging somewhere in the area of over \$300 per hour. I did see some of Mr. Groff's billing and his time was billed at well over \$300 per hour and I am sure that a review of the Scheer & Zehnder bills would bring to light their fees were much higher than mine. Therefore, if anything, my bills would be unreasonable because they were too light. However, that was the agreed-upon amount with the insurance company and one of the reasons that we are hired frequently by Arch is because we provide efficient service at a lower price.

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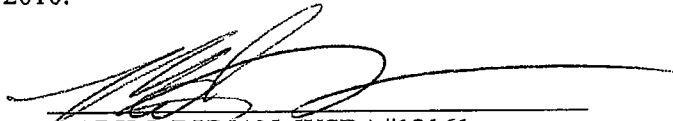
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1  
2 I declare under penalty of perjury that the foregoing is true and correct.

3 Dated this 26 day of July, 2010.

4  
5 

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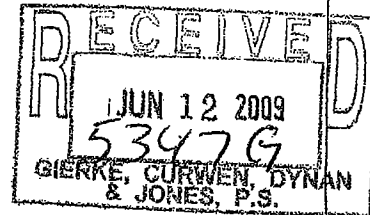
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ATTACHMENT A

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THE HONORABLE LAURA C. INVEEN  
HEARING DATE: JULY 10, 2009  
WITH ORAL ARGUMENT



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR KING COUNTY

BRE PROPERTIES, INC.,

Plaintiff,

v.

LEASE CRUTCHER LEWIS, LLC, et. al.

Defendants.

NO. 08-2-14232-9 SEA

NORTHWEST TOWER CRANE  
SERVICE'S MOTION FOR SUMMARY  
JUDGMENT DISMISSAL OF ALL  
CLAIMS

**I. INTRODUCTION**

**1. History of Bellevue Tower 333 Litigation: Four Consolidated Actions known as "In re Tower Crane"**

This lawsuit concerns the collapse of a construction tower crane in Bellevue, Washington on November 16, 2006. The tower crane was servicing the construction of a high-rise building called the Bellevue Tower 333 Project. The collapse caused the death of one individual and damage to a number of buildings and businesses.

Northwest Tower Crane (NWTC) is aware of six lawsuits regarding the tower crane collapse. In April and May of 2007, four of those lawsuits were filed by the Estate of Ammons (the individual who was killed), Brickman Civica, Intelligent Results, and Plaza

NORTHWEST TOWER CRANE SERVICE'S MOTION FOR  
SUMMARY JUDGMENT DISMISSAL OF ALL CLAIMS - Page 1

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1 305 (various property owners and affected businesses). These four plaintiffs sued the general  
2 contractor, Lease Crutcher Lewis (LCL), and the structural engineer, Magnusson Klemencic  
3 Associates (MKA). LCL brought five subcontractors into the suit via a third-party  
4 complaint: Bureau Veritas (BVNA); Caliper Inspections; Leibherr; Northwest Tower Crane  
5 (NWTC); and S&S Welding. MKA named these five subcontractors and two others—  
6 Morrow Equipment Company and Ness Crane—as potential non-parties at fault. In  
7 response, the four plaintiffs amended their Complaints to sue the seven subcontractors  
8 directly and moved to consolidate their four actions. The cases were consolidated as IN RE  
9 TOWER CRANE COLLAPSE and assigned Cause No. 07-2-33136-1 SEA. The Honorable  
10 Judge Trickey became the assigned individual calendar judge.

11  
12 Those four plaintiffs diligently prosecuted their cases. Approximately 40 experts and  
13 40 lay witnesses were deposed. Extensive discovery was completed and metallurgical testing  
14 performed. Each of the seven subcontractors filed summary-judgment motions before the  
15 scheduled April 6, 2009 trial date. All the subcontractors were eventually dismissed on the  
16 merits by Judge Trickey with prejudice.

17  
18 The general contractor, LCL, and the structural engineer, MKA, were not dismissed.  
19 Consequently, LCL and MKA settled their claims with the first-party plaintiffs. As a result,  
20 the only claims remaining in the IN RE TOWER CRANE COLLAPSE action are LCL's  
21 construction delay claims against MKA, which are being referred to as "affirmative" claims.  
22 Trial regarding LCL's affirmative claims against MKA has been temporarily postponed while  
23 LCL and MKA attempt to negotiate a settlement.

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25 ///



1     **2. History of BRE Properties and Travelers Insurance Lawsuits**

2             In addition to the four consolidated lawsuits, two additional lawsuits were filed by  
 3 BRE Properties (property owner) and Travelers Insurance (subrogated interest regarding the  
 4 cost of the damaged tower crane). BRE and Travelers both sued LCL, MKA, and a handful  
 5 of subcontractors, including NWTC, directly. As it did in the IN RE TOWER CRANE  
 6 COLLAPSE matter, LCL asserted claims against the subcontractors, including NWTC.

7  
 8             BRE and Travelers chose to not consolidate their actions with the IN RE TOWER  
 9 CRANE COLLAPSE matter. Rather, Travelers moved to intervene in the BRE action and  
 10 both took a wait-and-see approach. BRE and Travelers have done little to prosecute this  
 11 matter. They have noted no depositions or conducted any formal discovery that NWTC is  
 12 aware of. They rarely attended any of the IN RE TOWER CRANE COLLAPSE depositions.  
 13 (Please Note: All deposition cited to in this motion were taken pursuant to the IN RE  
 14 TOWER CRANE COLLAPSE matter.)

15  
 16             Subsequent to the dismissal of the seven subcontractors in the IN RE TOWER  
 17 CRANE COLLAPSE matter, the subcontractors requested BRE similarly dismiss them from  
 18 this action. However, BRE has refused to do so. Apparently, BRE is attempting to negotiate  
 19 a settlement with LCL, but it has been months since NWTC has heard any news regarding  
 20 this representation. NWTC and the other subcontractors should be dismissed from this  
 21 lawsuit just as they were in the IN RE TOWER CRANE COLLAPSE matter over two  
 22 months ago. It is improper for BRE to hold them captive while it negotiates settlement with  
 23 the truly responsible parties (LCL and MKA) as the October 12, 2009 trial date approaches.  
 24 (As discussed below, BRE failed to disclose any expert witnesses whatsoever on the May 11,  
 25  
 26

1 2009 Disclosure of Possible Primary Witnesses deadline. And BRE's responses to NWTC's  
 2 contention interrogatories merely state, "BRE incorporates the expert materials prepared by  
 3 the experts for all plaintiffs in the consolidated crane case collapse litigation.")

4 To the contrary, Travelers apparently agrees the subcontractors should be dismissed  
 5 and, to that end, Travelers filed a Proposed Order Granting Voluntary Dismissal with the  
 6 court on April 24, 2009. However, NWTC has not yet received a conformed copy.

## 8 **II. RELIEF REQUESTED**

### 9 **1. Claim Preclusion: Dismissal of LCL's Claims against NWTC**

10 On May 4, 2009, Judge Trickey formalized his April 20, 2009 oral ruling and entered  
 11 a final judgment on the merits dismissing all claims asserted by all parties against NWTC in  
 12 the IN RE TOWER CRANE COLLAPSE matter with prejudice. LCL was a party to that  
 13 action and asserted the same claims against NWTC there then as it does here now.  
 14 Therefore, the doctrines of claim preclusion and res judicata require this Court to similarly  
 15 dismiss LCL's current claims against NWTC in this action with prejudice.

### 17 **2. Claim Preclusion: Dismissal of BRE's Claims against NWTC**

18 Although BRE was not a party to the IN RE TOWER CRANE COLLAPSE matter, it  
 19 has totally aligned its liability case here with that of the plaintiffs in that matter. First, BRE  
 20 failed to disclose any expert witnesses whatsoever on the May 11, 2009 Disclosure of  
 21 Possible Primary Witnesses deadline. Additionally, BRE's responses to NWTC's contention  
 22 interrogatories merely stated that, "BRE incorporates the expert materials prepared by the  
 23 experts for all plaintiffs in the consolidated crane case collapse litigation." Because BRE has  
 24 adopted the identical position in this case that the plaintiffs did in the IN RE TOWER  
 25  
 26

1 CRANE COLLAPSE matter, and because it has presented no new or additional experts or  
 2 theories of liability, the doctrines of claim preclusion and res judicata require this Court to  
 3 also dismiss BRE's claims against NWTC in this action with prejudice.

4 **3. Dismissal of all BRE, Travelers, and LCL Claims: NWTC was Not a Cause or**  
 5 **Proximate Cause of the Collapse**

6 In the IN RE TOWER CRANE COLLAPSE matter, Lease Crutcher Lewis (LCL)  
 7 employees testified they have no complaints about the work performed by Northwest Tower  
 8 Crane (NWTC), its crane-erection subcontractor. Magnusson Klemencic Associates (MKA)  
 9 employees testified they have no complaints about the work performed by NWTC. The  
 10 construction-management and construction-safety experts retained by plaintiffs in the IN RE  
 11 TOWER CRANE COLLAPSE matter testified they have no complaints about the work  
 12 performed by NWTC. No fact witness or qualified expert has testified that NWTC caused,  
 13 or was the proximate cause, of the tower-crane collapse. BRE has failed to disclose any  
 14 liability experts or lay witnesses. Therefore, BRE's claims against NWTC are merely  
 15 premised upon the same attorney conjecture that was alleged in the IN RE TOWER CRANE  
 16 COLLAPSE matter, which was not sufficient evidence to avoid summary-judgment dismissal  
 17 there, nor is it sufficient to avoid summary judgment here.

20 **4. LCL and MKA Solely Responsible—Miscommunication on Part of LCL and**  
 21 **MKA resulted in Grossly Under-Designed Tower Crane Base**

22 LCL, the general contractor, hired MKA, a structural engineering firm, to design a  
 23 non-traditional steel crane base to support the Project's tower crane. Due to a colossal  
 24 miscommunication between the two regarding how to resist the tower crane's overturning  
 25 moment, the steel crane base was designed to be much weaker than it needed to be, unless  
 26

1 the tower crane was simultaneously supported by a tie-in brace connecting the tower crane's  
2 mast to the building structure about five-stories above the crane base. No such tie in was  
3 installed because of the miscommunication between LCL and MKA. LCL and MKA  
4 employees have testified NWTC had no involvement in these communications.

5  
6 The cause of the collapse was a crack in the base that developed due to repetitive  
7 cyclical loading. The proximate cause of the collapse was the LCL-MKA miscommunication  
8 that resulted in a crane base that was too weak to support the crane without simultaneous  
9 support from a five-story tie-in to the crane mast. There simply is no issue of material fact  
10 linking NWTC to the cause or proximate cause of the collapse. The collapse would have  
11 occurred irrespective of the allegations against NWTC. No reasonable jury would find  
12 otherwise.

13  
14 BRE's answers to NWTC's contention interrogatories state that its case against  
15 NWTC is merely premised upon "the expert materials prepared by the experts for all  
16 plaintiffs in the consolidated crane case collapse litigation." Therefore, BRE has no evidence  
17 that anything other than the LCL-MKA miscommunication caused the collapse.

18 **5. NWTC Warned LCL to Have an Engineer Inspect the Base: MKA Failed to**  
19 **Properly Inspect**

20 On the day the crane was erected, the base made a strange "popping" noise. NWTC  
21 employees told LCL to have the crane base inspected by the engineer who designed it to  
22 ensure it was manufactured and functioning as designed. Although NWTC and LCL  
23 concurred that the safest course of action was to finish erecting the crane so it would be  
24 balanced, NWTC explicitly instructed LCL that the base had to be inspected by the designing  
25 engineer as soon as possible. NWTC employees are not engineers and had no knowledge of  
26

1 how the crane base was designed or supposed to function. The erection plans did not indicate  
2 a supporting tie-in was to be installed. NWTC followed the plans.

3 LCL followed NWTC's warning and had MKA inspect the crane base two days later.  
4 However, MKA failed to notice that the supporting tie-in brace that it had anticipated would  
5 connect the crane mast to building structure was not present. Incredibly, it failed to notice  
6 that the five-story building structure that was supposed to support the tie-in didn't even exist.  
7 LCL had failed to construct the five-story core of the building as MKA anticipated and MKA  
8 didn't even notice! Clearly, NWTC was not the cause or proximate cause of the collapse and  
9 should be dismissed. BRE has disclosed no experts or evidence to the contrary.

### 11 III. STATEMENT OF FACTS

#### 12 A. Parties

13 Plaintiff BRE Properties has an interest in the Pinnacle Bell Center which was  
14 damaged when the subject tower crane collapsed on it on November 16, 2006. It sues for  
15 repair costs, emergency action costs, and lost rent.

16 BRE failed to disclose any experts in its mandatory Disclosure of Possible Primary  
17 Witnesses, which was due on May 11, 2009. (Exhibit 1 to Declaration of Mazhari: Plaintiff  
18 BRE Properties Disclosure of Possible Primary Witnesses). It also failed to disclose any  
19 witness or liability experts in its answers to NWTC's expert interrogatories. (Exhibit 2 to  
20 Declaration of Mazhari: BRE Properties' Answers and Responses to NWTC's Expert  
21 Interrogatories.) Critically, in its answers to NWTC's contention interrogatories, it  
22 specifically adopted the contentions of the consolidated plaintiffs as follows:

23 BRE incorporates the expert materials prepared by the experts for all  
24 plaintiffs in the consolidated crane case collapse litigation.

1 (Exhibit 3 to Declaration of Mazhari: BRE Properties' Answers and Responses to NWTC's  
2 Contention Interrogatories at pg. 4 ln. 19-21.) Other than simply parroting the plaintiffs'  
3 contentions in the IN RE TOWER CRANE COLLAPSE matter, BRE has disclosed no  
4 experts and has made no independent contentions to support its allegations against NWTC.  
5

6 Likewise, neither Travelers Insurance nor LCL even bothered to file the mandatory  
7 Disclosure of Possible Primary Witnesses in this matter, which had a deadline of May 11,  
8 2009. Consequently, no party to this litigation has made any allegations that differ from  
9 those presented and ruled upon on the merits by Judge Trickey in the IN RE TOWER  
10 CRANE COLLAPSE matter.

11 LCL was the general contractor in control of the Tower 333 Project. After LCL was  
12 sued by BRE, it asserted cross claims against the various subcontractors, including NWTC.  
13 MKA was the engineer of record and designer of the Tower 333 building. It was separately  
14 engaged by LCL to design the steel base that supported the tower crane.  
15

16 NWTC is a construction subcontractor that primarily specializes in erecting and  
17 dismantling tower cranes and manlifts. (Weber Decl. at ¶ 3.) NWTC was dismissed from  
18 the IN RE TOWER CRANE COLLAPSE matter by Judge Tricky with prejudice after a  
19 hearing on the merits. (Exhibit 4 to Declaration of Mazhari: Order Granting NWTC's  
20 Motion for Reconsideration and Renewed Motion for Summary Judgment Dismissal.)  
21

22 NWTC provides the labor necessary to assemble and disassemble tower cranes. It does  
23 not design, manufacture, maintain, own, lease, and generally does not even transport the  
24 tower cranes it assembles. It merely puts them up and takes them down pursuant to the plans  
25 provided by the hiring entity and the owner of the crane. (Weber Decl. at ¶ 4.)  
26

1 With respect to the Tower 333 project, NWTC was hired by LCL to erect and  
 2 disassemble the tower crane intended to service the project pursuant to the plans provided by  
 3 LCL and the crane owner, Morrow. (Ex. 9 to Bendele Decl. (NWTC Subcontract) at p. 1, ¶  
 4 3.; Weber Decl. at ¶ 6-7.) NWTC did not own, design, manufacture, lease, or maintain the  
 5 subject crane owned by Morrow. The plans called for the tower crane to be erected onto a  
 6 custom steel base. NWTC was not hired, and did not assist in the design, manufacture, or  
 7 maintenance of the steel base foundation designed by MKA. It did not even know the  
 8 identity of MKA at the time. (Weber Decl.) NWTC was not hired, nor is it licensed, to  
 9 provide any engineering or other design services. NWTC was not hired, nor is it licensed, to  
 10 provide any surveying services. LCL had in-house surveying crews that performed the  
 11 survey measuring to ensure that the base was level and the tower mast was plumb. LCL and  
 12 its design and manufacture professionals are responsible for the crane base. NWTC is  
 13 responsible for assembling the crane on the base provided. (Weber Decl.; McKenney Decl;  
 14 Harr Decl.; Phinizy Decl.) LCL's Grant Willman testified that LCL is responsible for  
 15 providing NWTC with a crane base to assemble the crane onto and to make sure the base is  
 16 ready for NWTC. NWTC's scope of work is to assemble the crane upon the base LCL  
 17 provides. (Exhibit 1 to the Declaration of Levi Bendele ("Bendele Decl.") Deposition  
 18 Transcript of Grant Willman, hereinafter "Willman Dep.") at pp. 152-153:11-25 and 1-25.)

21 **B. Design of Tower Crane Base for the Tower 333 Project**

22 **1. LCL and MKA Decided to Use an Uncommon Steel Frame Base**

23 Generally tower cranes are erected upon concrete bases. Two previous attempts to  
 24 develop the Project had been started and failed such that several floors of an underground  
 25 garage and elevator core were present when the project began. LCL determined that the  
 26



1 location of the previous concrete crane base would be insufficient for the work required on  
2 the new building plan, thus, a new location for the tower crane was needed. The new  
3 location was on top of the floors of the underground garage, which were too weak to support  
4 the weight of a traditional concrete base and a tower crane.

5 **2. Miscommunication between LCL and MKA**

6 MKA and LCL had a brainstorming session on June 15, 2006. LCL's Grant Willman  
7 was present along with MKA's engineer Dough Loesch. They decided MKA would design  
8 an H-shaped steel crane base on the top deck of the existing parking structure which would  
9 be connected into the building's vertical support columns, which were strong enough to  
10 support the weight of the crane. This plan spared the expense of demolishing and replacing  
11 the parking structure.

12 A design idea called "Alternative F" was discussed at the June 15, 2006 meeting.  
13 (Ex. 2 to Bendele Decl. (Alternative F)) It called for the strength of the crane base to be  
14 supplemented by an initial tie-in brace between the crane mast and an adjacent structure,  
15 such as the building's concrete elevator core, approximately five stories above the crane base.  
16 The existence of the tie-in brace would eliminate the crane's "overturning moment" so the  
17 base itself did not have to. Thus the base itself could be much weaker if a tie-in were  
18 utilized, than it would need to be without one. LCL alleges that the Alternative F design was  
19 rejected because the building core was not high enough to provide a tie-in position for the  
20 crane in its initial assembly position. (Ex. 1 to Bendele Decl. (Willman Dep.) at p. 62:1-25)  
21 At the same time, however, LCL's Grant Willman admits that had he been more clear in his  
22 memo confirming the June 15, 2006 meeting, perhaps the miscommunication would not have  
23 occurred. (Ex. 1 to Bendele Decl. (Willman Dep.) at pp. 158-159:16-24 and 1-14.)

24 MKA's Doug Loesch states that based on the June 15, 2006 design meeting and his  
25 communications with LCL, he believed the building core would be built up by LCL such that  
26

1 Alternative F would be implemented when the crane was erected. Therefore, he designed a  
 2 steel frame base assuming that the tower crane would exert no overturning moment on the  
 3 base due to the tie-in. Id. at pp. 397-398:16-24 and 1-4.

4 Such a base could be designed to be weaker than a base that would not have the  
 5 benefit of supplemental support from a tie-in brace. Mr. Loesch essentially contends that no  
 6 one at LCL informed him that the tie-in would not be implemented on the tower crane in its  
 7 initial assembly position. Id. at pp. 302-303:23-25 and 1-2. Consequently, MKA designed a  
 8 crane base that required the installation of an initial tie-in brace to properly support the  
 9 subject tower crane.

10 **3. Erection Plans Indicated Crane was to be Freestanding and Without an**  
 11 **Initial Tie-In Brace**

12 LCL's Grant William testified that the plans provided to NWTC for the erection of the  
 13 crane, and the bid provided by NWTC to LCL, all indicated that that initial configuration of  
 14 the crane would be "free standing on foot anchor" and without the implementation of any tie-  
 15 in brace when erected. (Ex. 1 to Bendele Decl. (Willman Dep.) pp. 148-151:14-25, 1-25, 1-  
 16 25, and 1-25.) These were the plans distributed to NWTC by LCL and the crane's owner,  
 17 Morrow. Id. NWTC erected the crane according to the plans provided. (Weber Decl. at ¶  
 18 4.) NWTC had no idea an initial tie-in was contemplated by the engineer, it only knew what  
 19 the plans said. If the plans had called for an initial tie in, a completely different assembly  
 20 procedure would have been required, a different bid would have been written, assembly  
 21 would have taken two days, and NWTC would have had to charge LCL more to do the job.  
 22 Id. at at ¶ 15. And most glaringly, NWTC would have noticed that there was no five story  
 23 building core to attach the tie-in to. Id. LCL's Willman is not aware of anyone ever  
 24 providing NWTC with the Alternative F plans. (Ex. 1 to Bendele Decl. (Willman Dep.) p.  
 25 151:11-13.)

1           **4. LCL and MKA Employees Confirm NWTC Not Involved with Design**

2           LCL's Grant William testified that NWTC did not have anything to do with the design  
3 of the base or the construction of the base. (Ex. 1 to Bendele Decl. (Willman Dep.) p. 153:8-  
4 25.) MKA's Doug Loesch confirmed that NWTC was not involved in designing the crane  
5 base. (Ex. 3 to Bendele Decl. (Loesch Dep.) at p. 16:18-20.) Further, Mr. Loesch testified  
6 that he did not "have any criticism or complaint whatsoever about the work performed by  
7 [NWTC]." *Id.* at p. 15:11-15. Ms. Gretchen Humphrey also testified she had no criticism of  
8 NWTC. (Ex. 4 to Bendele Decl. (Humphrey Dep.) p. 279:9-14.)

9           **5. Experts Testify that NWTC Not Involved or Responsible for**  
10           **Miscommunication between MKA and LCL**

11           Allan Hauck is the Department head of the Construction Management Department at  
12 California Polytechnic State University. He was jointly retained by the first-party plaintiffs  
13 in the IN RE TOWER CRANE COLLAPSE matter. He testified that he believes the MKA-  
14 LCL miscommunication caused the crane collapse. He further testified that, "I do not believe  
15 there was any contribution from NWTC to that misunderstanding" (the [MKA-LCL]  
16 miscommunication). (Ex. 5 to Bendele Decl. (Hauck Dep.) p. 80:4-14.) Expert Hauck  
17 further testified that he believed NWTC was not responsible for the crane collapse at the  
18 Bellevue Tower 333 Project. *Id.* at. 81:17-20.

19           The IN RE TOWER CRANE COLLAPSE matter Plaintiff's construction-safety  
20 expert Kurt Stranne did not have any opinion that NWTC violated any duties or standards of  
21 care. (Ex. 6 to Bendele Decl. (Stranne Dep.) p. 72:5-14.) Similarly, LCL's construction  
22 expert, John Putnam, did not have any opinion that NWTC violated and duties, standards of  
23 care, or contributed to the cause of the crane collapse. (Ex. 7 to Bendele Decl. (Putnam  
24 Dep.) pp. 154-155:17-25 and 1-2.)

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26           ///

**C. NWTC's Pre-Crane-Erection Involvement in the Tower 333 Project**

**1. "Base Tower" used as Template for Steel Base Two Weeks before Day of Erection**

The "base tower" is the first mast section of the tower crane installed on the "crane base." The names "base tower" and "crane base" can be confusing. The subject base tower was manufactured by Liebherr, stands approximately 38 feet tall, and was painted yellow. It is separate and distinct from the steel base designed by MKA, which is shaped like an "H" and is reddish in color. (Weber Decl. at ¶ 8.) The base tower was delivered to the job site while the MKA designed base was under construction to ensure the bolt-hole pattern of the base tower would properly match the bolt-hole pattern being constructed on the steel base.

**2. NWTC Was Not Responsible for the Crane Base**

NWTC had no involvement in the design, manufacture, or installation of the crane base. (Ex. 1 to Bendele Decl. (Willman Dep.) p. 153:3-25; Ex. 8 to Bendele Decl. (Kragseth Dep.) p. 157:8-20; Ex. 9 to Bendele Decl. (Akre Dep.) pp. 94-95:20-25 and 1-17; Ex. 10 to Bendele Decl. (Weber Dep.) p. 32:6-19.) NWTC was not responsible to check the welding on the crane base foundation. (Ex. 11 to Bendele Decl. (Hagwood Dep.) p. 146:21-25.) NWTC was not responsible for determining whether additional inspection or testing of the crane base was required after the tower was assembled. (Ex. 8 to Bendele Decl. (Kragseth Dep.) p. 159:12-16.) LCL was responsible for constructing the tower crane base frame, sequencing and coordinating the design, construction, and inspection of the base foundation. Id. at pp. 156-157:7-25 and 1-19.

**3. NWTC Had the Shims Manufactured based upon LCL's Measurements to Ensure its Base Tower was Level**

After the manufacture of the crane base was completed, LCL's on-site survey engineers measured or "shot the elevation" to make sure it was level. (Ex. 11 to Bendele Decl. (Hagwood Dep.) p. 121:8-25; Ex. 8 to Bendele Decl. (Kragseth Dep.) p. 164:1-19.) The data from the LCL survey engineers was then used to determine out how thick of shims

1 were needed for the crane base. (Ex. 8 to Bendele Decl. (Kragseth Dep.) p. 164:13-19.) The  
 2 information was provided to NWTC who had the shims manufactured by a fabrication shop.  
 3 (Ex. 10 to Bendele Decl. (Weber Dep.) p. 47:3-24; Weber Decl. at ¶ 9.)

4 NWTC employee Eric McKenney installed the shims two days before the crane was  
 5 erected and adjusted them pursuant to the instruction of the LCL surveyors until the base  
 6 tower was plumb. (McKenney Decl.) After NWTC installed the shims, the LCL surveyors  
 7 determined that the shims were plumb and looked "good." (Ex. 8 to Bendele Decl. (Kragseth  
 8 Dep.) pp. 165-166:1-25 and 1-11.) NWTC was not responsible for determining whether the  
 9 base tower was plumb. *Id.* at p. 166:12-20. NWTC does not employ surveyors or structural  
 10 engineers and was not responsible for taking measurements of the crane base. (Ex. 11 to  
 11 Bendele Decl. (Hagwood Dep.) p. 140:23-25; Ex. 8 to Bendele Decl. (Kragseth Dep.) p.  
 12 157:12-20.)

13 **D. Tower Crane Assembly on September 9, 2006**

14 **1. Erection of the Mast of the Tower Crane**

15 The tower crane was assembled on Saturday, September 9, 2006. The crane was  
 16 owned by Morrow. Its representative, B.A. Phillips, was overseeing the erection process.  
 17 Morrow provides the plans and jib configurations and NWTC assembles the crane according  
 18 to the plans. NWTC employees are union ironworkers. They are not surveyors or engineers.  
 19 NWTC had no engineer on its crew or staff. NWTC doesn't operate the crane. (Weber  
 20 Decl.; Harr Decl.; Phinizy Decl.)

22 The NWTC crew divided into two groups. One group worked on the ground to  
 23 unload the crane pieces from the delivery trucks and do preliminary assembly. The other was  
 24 on the crane and attached the preassembled pieces to the crane as it was assembled. (Harr  
 25 Decl.; Phinizy Decl.; Weber Decl.) After the crane's mast was erected, but before the  
 26

1 counter jib was installed, LCL's surveying crew "shot" the tower again to ensure that it was  
 2 plumb. (Ex. 12 to Bendele Decl. (Hagwood Dep. of L&I Transcript) pp. 566-568:2-25, 1-  
 3 25, and 1-4.)

4 **2. Rotation of Counter-jib and Machine Deck Caused a Loud 'Popping'**  
 5 **Noise to Occur at Crane Base**

6 Once the counter jib and machine deck were installed, the crane was rotated 180  
 7 degrees to allow the front jib to be raised into position and attached. While the crane was  
 8 rotating a loud popping sound was heard at the base. LCL's Kyle Kragseth ordered the  
 9 NWTC team to come down from the crane, and halt the assembly. (Ex. 8 to Bendele Decl.  
 10 (Kragseth Dep.) p. 169:10-14.)

11 **3. Inspection of the Crane Base after Popping Noise**

12 LCL was the general contractor and was responsible for the safety of the entire job  
 13 site. (Ex. 8 to Bendele Decl. (Kragseth Dep.) p. 169:18-25.) LCL's Jon Hagwood was in  
 14 charge that day. Representatives from Morrow, LCL, and NWTC gathered around the crane  
 15 base and visually inspected the base. (Ex. 11 to Bendele Decl. (Hagwood Dep.) pp. 130-  
 16 131:5-25 and 1-17.) LCL Employee Craig Harr stated that the crane base was so "odd" that  
 17 no one at LCL knew how it was going to react. (Ex. 13 to Bendele Decl. (Craig Harr Dep.)  
 18 pp. 126-127:2-25 and 1-4.) Various workers looked at the steel base and saw slip joints,  
 19 grout pads, and some cracked plywood that had been used to build a form for the pouring of  
 20 the grout pad. (Ex. 11 to Bendele Decl. (Hagwood Dep.) pp. 130-131:5-25 and 1-17.) The  
 21 welds appeared to be intact and did not appeared to have any defects when inspected by  
 22 LCL's Craig Harr. (Jeff Harr Decl. at ¶ 9; Phinizy Decl. at ¶ 10; Ex. 13 to Bendele Decl.  
 23 (Craig Harr Dep.) 127:2-4.)

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25 ///

1           **4. LCL States That the Base was Stamped by and Engineer and**  
 2           **Purposefully Designed to Deflect**

3           There was concern regarding whether the crane base was designed properly. Dan  
 4           Schaefer from NWTC spoke to who is assumed to be Jon Hagwood (a large African-  
 5           American LCL superintendent). Schaefer expressed concern that the crane base had  
 6           deflected. Another NWTC employee, Chad Peterson also expressed his opinion that  
 7           something seemed amiss. (Ex. 14 to Bendele Decl. (Schaefer Dep.) p. 35:1-25.) Jon  
 8           Hagwood told them the base was specifically designed to deflect. *Id.* at p. 33:2-19. He told  
 9           Schaefer that, "We went to school for this and we know what were doing." Schaefer felt  
 10          Hagwood was implying they were stupid. *Id.* at p. 35:18.24. Hagwood told the NWTC  
 11          employees that the base had been designed by the engineer to move and that it was  
 12          functioning as designed. (Phinizy Decl. at ¶ 10-14; Ex. 14 to Bendele Decl. (Schaefer Dep.)  
 13          p. 33:2-19.)

14          Another NWTC employee, William Phinizy, had a further conversation with a female  
 15          LCL employee with blonde shoulder-length hair, about 5'6" tall, and average weight. He  
 16          does not recall her name or title, but she appeared to be some sort of a design professional.  
 17          He told her, as he had told Jon Hagwood, that he had concerns about the base deflection. She  
 18          told Mr. Phinizy that she gets paid \$150,000 per year to design this stuff and that LCL knows  
 19          what its doing. (Phinizy Decl. at ¶ 15.)

20          The Morrow representative, B.A. Phillips, was present at the base when Dan Schaefer  
 21          demanded LCL have an engineer come look at the base before the crew re-ascended the  
 22          crane. (Ex. 15 to Bendele Decl. (Phillips Dep.) p. 60:14-21). A thin Caucasian man with a  
 23          white hard hat, who Phillips assumed was an engineer, examined the base while they ate  
 24          lunch. *Id.* at 33-34:20-24. After lunch LCL employee Craig Harr told them that "nothing  
 25          was found to be wrong" and they went back to work. *Id.* at 39-40:23-11.

26          ///



1           **5. LCL Surveyors Measure Crane Base After Popping Noise**

2           LCL surveyors measured the crane base after the popping noise. NWTC employee  
3 Gator Rasmussen assisted the LCL surveyors by holding a ruler in place as instructed. LCL  
4 assistant superintendent Craig Harr observed the process and states there was an elevation  
5 difference of one inch from beam to beam. (Ex. 13 to Bendele Decl. (Craig Harr Dep.) p.  
6 54:1-7.) Craig Harr knew MKA had engineered the base but did not attempt to call its  
7 engineers on a Saturday. He felt this task was Jon Hagwood's responsibility and left it to  
8 Hagwood to call MKA. *Id.* at 118:12-20. LCL's Jon Hagwood did call MKA and testified  
9 that he did not expect NWTC employees, workers who were not structural engineers, to  
10 verify that MKA had designed the crane base properly. (Ex. 11 to Bendele Decl. (Hagwood  
11 Dep.) p. 141:5-9.)

12           **6. LCL's Hagwood Speaks with NWTC's Dave Weber: LCL Instructed to**  
13 **have Crane Base Inspected by Engineer**

14           NWTC employees Jeff Harr and Dan Schaefer called NWTC president Dave Weber,  
15 to advise him of what happened. Mr. Weber asked who was present, what had been found,  
16 and what had been decided. LCL's Jon Hagwood and NWTC's Dave Weber then spoke on  
17 the phone. (Ex. 11 to Bendele Decl. (Hagwood Dep.) pp. 131-132:24-25 and 1-24.; Weber  
18 Decl.) Hagwood confirmed the base had been designed by an engineer. They agreed that the  
19 crane was in a precarious position because it was very unbalanced. Attaching the front jib to  
20 the crane would serve to balance out the crane. Dave Weber told Jon Hagwood that he  
21 should call the engineers to inspect the base. (Weber Decl.)  
22

23           **7. Jon Hagwood Made the Decision to Finish Assembly to Balance Crane**  
24 **and Called MKA to Investigate**

25           Jon Hagwood gave the orders to continue assembly of the crane, because with the  
26 weight of the counter-jib pushing the crane to lean to one side, the crane was in its most

1 vulnerable position of falling down at that point. (Ex. 13 to Bendele Decl. (Craig Harr Dep.)  
 2 p. 114:9-24; Ex. 8 to Bendele Decl. (Kragseth Dep.) pp. 174-175:4-25 and 1-14; Ex. 11 to  
 3 Bendele Decl. (Hagwood Dep.) pp. 133:6-17.) Dave Weber did not have authority over the  
 4 Project, and it was Jon Hagwood who supervised the crane assembly process at that point.  
 5 (Ex. 13 to Bendele Decl. (Craig Harr Dep.) pp. 116-117:16-25 and 1-20.) Additionally, Dave  
 6 Weber made no representation about whether the base was adequate before or after the  
 7 popping noise. (Ex. 13 to Bendele Decl. (Craig Harr Dep.) p. 118:6-11.)

8 That same day, immediately after the crane was assembled, Jon Hagwood called  
 9 Gretchen Humphrey, an MKA assistant structural engineer who was working with Doug  
 10 Loesch on the crane design team to discuss the loud "pop" which emanated from the crane  
 11 base. (Ex. 4 to Bendele Decl. (Humphrey Dep.) p. 261:6-13.) Mr. Hagwood requested that  
 12 someone from MKA come and inspect the crane base the following week. (Ex. 8 to Bendele  
 13 Decl. (Kragseth Dep.) p. 177:6-25.)

14 **E. Activity After Tower Crane Assembly**

15 **1. MKA's Visual Inspection of the Crane Base After the Popping Noise**

16 At the request of LCL, MKA's Doug Loesch visually inspected the base the following  
 17 week when he came to visit the site. (Ex. 8 to Bendele Decl. (Kragseth Dep.) p. 177:6-25.)  
 18 Mr. Loesch never took any measurements of the base to see if the base comported with the  
 19 calculated deflections. (Ex. 3 to Bendele Decl. (Loesch Dep.) p. 281:12-18.) Also, LCL did  
 20 not conduct a comprehensive crane-base inspection. (Ex. 8 to Bendele Decl. (Kragseth Dep.)  
 21 pp. 176-179:20-25, 1-25, 1-25, and 1-8.) MKA's Gretchen Humphrey told Kyle Kragseth  
 22 that the base appeared normal and told LCL to repair the areas around the crane base where  
 23 the grout had been broken on the day of assembly. *Id.* Incredibly, Mr. Loesch did not notice  
 24 that there was no "Alternative F" tie-in to the crane and that there was no five-story building  
 25  
 26

1 core to which the tie-in could be attached. (Ex. 3 to Bendele Decl. (Loesch Dep.) pp. 212-  
2 214:16-25, 1-25, and 1-16.)

### 3 2. Morrow's Load Testing and Certification of the Crane

4 Morrow conducted a load test two days after the crane was erected. (Ex. 13 to  
5 Bendele Decl. (Craig Harr Dep.), pp. 104:19-21.) NWTC's duties were simply to attach  
6 weights to the hook of the crane as directed by Morrow's technician. (Ex. 7 to Bendele Decl.  
7 (Putnam Dep.) pp. 155-156:3-25 and 1-10.) Morrow and LCL certified the crane for  
8 operation. B.A. Phillips signed for Morrow and Craig Harr signed for LCL. (Ex. 13 to  
9 Bendele Decl. (Craig Harr Dep.) pp. 104-105:22-25 and 1-9.; Exhibit 15 to Bendele Decl.  
10 (Morrow Crane Equipment Certificate)) Craig Harr understood the Certificate to mean that  
11 the load test had been performed to a specific standard with a Morrow technician on-site  
12 performing the test. (Ex. 13 to Bendele Decl. (Craig Harr Dep.) p. 105:14-17.) He also read  
13 and understood the purpose of the Certification before he signed it and stated he would have  
14 asked Jon Hagwood for clarification if he didn't. *Id.* at p. 105-106:18-25 and 1-8.

15 Paragraph 3 of the Certification applies to stationary cranes. It requires the lessee's  
16 representative to confirm that foundations were adequately installed and base section leveled.  
17 B.A. Phillips indicated that LCL was the lessee. (Ex. 16 to Bendele Decl. (Phillips Dep.), pp.  
18 85-86:2-25 and 1-2.) Even though the base was made of steel rather than concrete, Mr.  
19 Phillips indicates LCL still needed confirm it was adequately installed and level. *Id.*

### 20 3. Crane Usage for Nine Weeks

21 After the day of assembly, Jon Hagwood never followed up with NWTC regarding  
22 MKA's investigation of the foundation base after the loud popping noise because there was  
23 no concern with the crane base and thus nothing to report. (Ex. 11 to Bendele Decl.  
24 (Hagwood Dep.), pp. 137:2-21). If MKA had told Mr. Hagwood that NWTC needed to do  
25 some additional work or modification to the crane because of the condition of the steel  
26

1 foundation, Mr. Hagwood would have told NWTC to do it. Id. at p. 138:7-12. Mr. Hagwood  
 2 did not call NWTC to come back and do any work or modification to the crane after speaking  
 3 with MKA about their visual inspection. Id. at p. 138:13-22. After the crane was assembled,  
 4 NWTC left the site, and had no responsibility to measure the base or conduct testing. Id. at  
 5 p. 147:11-18. The crane was used for nine weeks before collapsing.

6 **4. LCL Employees Testify NWTC did Nothing Wrong and Did Not Violate**  
 7 **its Contractual Duties**

8 LCL's Senior Project Superintendent Jon Hagwood testified that he had no complaints  
 9 with the work performed by NWTC. Id. at p. 147:19-24. He stated, "I have a lot of respect  
 10 for Weber and his crew. I think they are professionals in the industry. I've worked with them  
 11 for years and think they are true professionals." Jon Hagwood's replacement, Scott Akre,  
 12 testified that he was not aware of any manner in which NWTC's work did not comply with  
 13 its contract. (Ex. 9 to Bendele Decl. (Akre Dep.), p. 92-93:9-25 and 1-22.) He further  
 14 explained that if NWTC's work did not comply with its contract, he would have notified  
 15 NWTC in a writing that identified any non-conforming issues. This did not occur. Id.

16 **IV. ISSUES PRESENTED**

17 (1) Should this Court dismiss all LCL claims against NWTC pursuant to the  
 18 doctrines of claims preclusion and res judicata because: (a) LCL was a party to the IN RE  
 19 TOWER CRANE COLLAPSE matter and asserted the same claims against NWTC there  
 20 then as it does here now; and (b) Judge Trickey entered a final judgment on the merits  
 21 dismissing all claims asserted by all parties, including LCL, against NWTC in the IN RE  
 22 TOWER CRANE COLLAPSE matter with prejudice?  
 23

24 (2) Should this Court dismiss all BRE claims against NWTC pursuant to the  
 25 doctrines of claims preclusion and res judicata because: (a) BRE's answers to NWTC's  
 26

1 contention interrogatories merely "incorporates the expert materials prepared by the experts  
 2 for all plaintiffs in the consolidated crane collapse litigation"; (b) BRE has disclosed no new  
 3 or additional experts or theories of liability; and (c) Judge Trickey entered a final judgment  
 4 on the merits dismissing all claims asserted by all parties against NWTC in the IN RE  
 5 TOWER CRANE COLLAPSE matter with prejudice?

6  
 7 (3) Should the court dismiss all claims against NWTC because BRE, Travelers,  
 8 and LCL have failed to provide evidence or testimony that shows NWTC was a cause or  
 9 proximate cause of the tower crane collapse?

#### 10 V. EVIDENCE RELIED UPON

11  
 12 The pleadings and files herein. The Declaration of Levi Bendele with the following  
 13 Exhibits:

- 14 Exhibit 1: Deposition Transcript of Grant Willman (LCL)
- 15 Exhibit 2: Alternative "F" Plans
- 16 Exhibit 3: Deposition Transcript of Doug Loesch (MKA)
- 17 Exhibit 4: Deposition Transcript of Gretchen Humphrey (MKA)
- 18 Exhibit 5: Deposition Transcript of Allan Hauck (Four Plaintiffs)
- 19 Exhibit 6: Deposition Transcript of Kurt Stranne (Four Plaintiffs)
- 20 Exhibit 7: Deposition Transcript of John Putnam (LCL)
- 21 Exhibit 8: Deposition Transcript of Kyle Kragseth (LCL)
- 22 Exhibit 9: Deposition Transcript of Scott Akre (LCL)
- 23 Exhibit 10: Deposition Transcript of Dave Weber (NWTC)
- 24 Exhibit 11: Deposition Transcript of Jonathon Hagwood (LCL)
- 25 Exhibit 12: Deposition Transcript of Jonathon Hagwood from Department of L & I  
 (LCL)
- 26 Exhibit 13: Deposition Transcript of Craig Harr (LCL)
- Exhibit 14: Deposition Transcript of Dan Schaefer (NWTC)



1 TOWER CRANE COLLAPSE matter Plaintiffs' construction-management expert (Hauck)  
 2 and construction-safety expert (Stranne) have no issues with the work NWTC performed.  
 3 LCL's construction expert Putnam has no issues with the work NWTC performed.

4 Neither BRE, Travelers, or LCL disclosed a crane expert to testify regarding the  
 5 standard of care applicable to a tower-crane erection company in this matter. This is highly  
 6 irregular in a lawsuit involving the collapse of a crane where a crane-erection company has  
 7 been sued. Perhaps they did speak to consulting crane experts, but decided against disclosing  
 8 any such experts when they were told NWTC did nothing wrong?

10 This Court has given BRE, Travelers, and LCL more than enough time to develop  
 11 material facts that show NWTC caused or contributed to the collapse. None have been  
 12 developed or disclosed. Summary judgment dismissal is proper and justice requires NWTC,  
 13 its employees, and their families not be put through the expense and emotional toll of a 4-6  
 14 week trial.  
 15

#### 16 VIII. Proposed Order

17 A proposed form of Order is attached for the Court's reference.

18 DATED this day of June, 2009.

19 SCHEER and ZEHNDER LLP

20 By Levi Bendele

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Attorneys for Northwest Tower Crane Service,  
 Inc.



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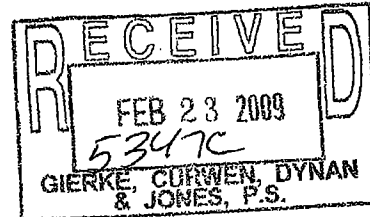
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**ATTACHMENT B**

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THE HONORABLE MICHAEL J. TRICKEY



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR KING COUNTY

IN RE

TOWER CRANE COLLAPSE,

NO. 07-2-33136-1 SEA

07-2-32215-9SEA  
07-2-33136-1SEA  
07-2-38868-1SEA  
07-2-39334-0SEA

NORTHWEST TOWER CRANE  
SERVICES'S MOTION FOR  
SUMMARY JUDGMENT

**I. RELIEF REQUESTED**

**1. NWTC was Not a Cause or Proximate Cause of the Collapse**

Lease Crutcher Lewis (LCL) employees have testified they have no complaints about the work performed by Northwest Tower Crane (NWTC), its crane-erection subcontractor. Magnusson Klemencic Associates (MKA) employees have testified they have no complaints about the work performed by NWTC. Plaintiffs' construction-management and construction-safety experts have testified they have no complaints about the work performed by NWTC. No fact witness or qualified expert has testified that NWTC caused, or was the proximate

NORTHWEST TOWER CRANE SERVICE'S MOTION  
FOR SUMMARY JUDGMENT - Page 1

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1 cause, of the tower-crane collapse. The claims against NWTC are merely premised upon  
2 attorney conjecture, which is not evidence sufficient to avoid summary-judgment dismissal.

3 **2. LCL and MKA Solely Responsible—Miscommunication on Part of LCL and**  
4 **MKA resulted in Grossly Under-Designed Tower Crane Base**

5 LCL, the general contractor, hired MKA, a structural engineering firm, to design a  
6 non-traditional steel crane base to support the Project's tower crane. Due to a colossal  
7 miscommunication between the two regarding how to resist the tower crane's overturning  
8 moment, the steel crane base was designed to be much weaker than it needed to be, unless  
9 the tower crane was simultaneously supported by a tie-in brace connecting the tower crane's  
10 mast to the building structure about five-stories above the crane base. No such tie in was  
11 installed because of the miscommunication between LCL and MKA. LCL and MKA  
12 employees have testified NWTC had no involvement in these communications.  
13

14 The cause of the collapse was a crack in the base that developed due to repetitive  
15 cyclical loading. The proximate cause of the collapse was the LCL-MKA miscommunication  
16 that resulted in a crane base that was too weak to support the crane without simultaneous  
17 support from a five-story tie-in to the crane mast. There simply is no issue of material fact  
18 linking NWTC to the cause or proximate cause of the collapse. The collapse would have  
19 occurred irrespective of the allegations against NWTC. No reasonable jury would find  
20 otherwise.  
21

22 **3. NWTC Warned LCL to Have Engineer Inspect the Base: MKA Failed to**  
23 **Properly Inspect**

24 On the day the crane was erected, the base made a strange "popping" noise. NWTC  
25 employees told LCL to have the crane base inspected by the engineer who designed it to  
26

1 ensure it was manufactured and functioning as designed. Although NWTC and LCL  
2 concurred that the safest course of action was to finish erecting the crane so it would be  
3 balanced, NWTC explicitly instructed LCL that the base had to be inspected by the designing  
4 engineer as soon as possible. NWTC employees are not engineers and had no knowledge of  
5 how the crane base was designed or supposed to function. The erection plans did not indicate  
6 a supporting tie-in was to be installed. NWTC followed the plans.

7  
8 LCL followed NWTC's warning and had MKA inspect the crane base two days later.  
9 However, MKA failed to notice that the supporting tie-in brace that it had anticipated  
10 would connect the crane mast to building structure was not present. Incredibly, it failed to  
11 notice that five-story building structure that was supposed to support the tie-in didn't even  
12 exist. LCL had failed to construct the five-story core of the building as MKA anticipated and  
13 MKA didn't even notice! Clearly, NWTC was not the cause or proximate cause of the  
14 collapse and should be dismissed.  
15

## 16 II. STATEMENT OF FACTS

### 17 A. Parties

18 Matthew Ammon was at home in his apartment when the tower crane collapsed and  
19 crushed him. Plaza 305 is a low-rise office building adjacent to the Tower 333 Project on the  
20 south. Intelligent Results was a tenant of the Plaza 305 building. Brickman Civica  
21 (Brickman) is the owner of the Civica Building which is located directly south of the Plaza  
22 305 building. LCL was the general contractor in control of the Tower 333 Project. After  
23 LCL was sued by the four consolidated plaintiffs, it asserted third-party claims against five  
24 third-party defendants: BVNA; NWTC; Caliber Inspection; S&S Welding; and Liebherr.  
25  
26

1 MKA was the engineer of record and designer of the Tower 333 building. It was separately  
2 engaged by LCL to design the steel base that supported the tower crane. After MKA was  
3 sued by the four consolidated plaintiffs, MKA asserted affirmative defenses that identified  
4 seven potential at-fault entities that included the five subcontractors sued by LCL plus  
5 Morrow Equipment Company and Ness Crane.

6  
7 NWTC was not originally sued by the consolidated plaintiffs. The first-party  
8 plaintiffs subsequently sued NWTC (and the other third-parties) to prevent the possibility of  
9 empty chairs at trial. NWTC is a construction subcontractor that primarily specializes in  
10 erecting and dismantling tower cranes and manlifts. (Weber Decl. at ¶ 3.) It provides the  
11 labor necessary to assemble and disassemble. It does not design, manufacture, maintain, own,  
12 lease, and generally does not even transport the tower cranes it assembles. It merely puts  
13 them up and takes them down pursuant to the plans provided by the hiring entity and the  
14 owner of the crane. *Id.* at ¶ 4.

15  
16 With respect to the Tower 333 project, NWTC was hired by LCL to erect and  
17 disassemble the tower crane intended to service the project pursuant to the plans provided by  
18 LCL and the crane owner, Morrow. (Ex. 9 to Bendele Decl. (NWTC Subcontract) at p. 1, ¶  
19 3.; Weber Decl. at ¶ 6-7.) NWTC did not own, design, manufacture, lease, or maintain the  
20 subject crane owned by Morrow. The plans called for the tower crane to be erected onto a  
21 custom steel base. NWTC was not hired, and did not assist in the design, manufacture, or  
22 maintenance of the steel base foundation designed by MKA. It did not even know the  
23 identity of MKA at the time. (Weber Decl.) NWTC was not hired, nor is it licensed, to  
24 provide any engineering or other design services. NWTC was not hired, nor is it licensed, to  
25  
26

NORTHWEST TOWER CRANE SERVICE'S MOTION  
FOR SUMMARY JUDGMENT – Page 4

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1 provide any surveying services. LCL had in-house surveying crews that performed the  
 2 survey measuring to ensure that the base was level and the tower mast was plumb. LCL and  
 3 its design and manufacture professionals are responsible for the crane base. NWTC is  
 4 responsible for assembling the crane on the base provided. (Weber Decl.; McKenney Decl;  
 5 Harr Decl.; Phinizy Decl.) LCL's Grant Willman testified that LCL is responsible for  
 6 providing NWTC with a crane base to assemble the crane onto and to make sure the base is  
 7 ready for NWTC. NWTC's scope of work is to assemble the crane upon the base LCL  
 8 provides. (Exhibit 1 to the Declaration of Levi Bendele ("Bendele Decl.") (Deposition  
 9 Transcript of Grant Willman, hereinafter "Willman Dep.") at pp. 152-153:11-25 and 1-25.)

#### 11 **B. Design of Tower Crane Base for the Tower 333 Project**

##### 12 **1. LCL and MKA Decide to Use an Uncommon Steel Frame Base**

13 Generally tower cranes are erected upon concrete bases. Two previous attempts to  
 14 develop the Project had been started and failed such that several floors of an underground  
 15 garage and elevator core were present when the project began. LCL determined that the  
 16 location of the previous concrete crane base would be insufficient for the work required on  
 17 the new building plan, thus, a new location for the tower crane was needed. The new  
 18 location was on top of the floors of the underground garage, which were too weak to support  
 19 the weight of a traditional concrete base and a tower crane.

##### 20 **2. Miscommunication between LCL and MKA**

21 MKA and LCL had a brainstorming session on June 15, 2006. LCL's Grant Willman  
 22 was present along with MKA's engineer Dough Loesch. They decided MKA would design  
 23 an H-shaped steel crane base on the top deck of the existing parking structure which would  
 24 be connected into the building's vertical support columns, which were strong enough to  
 25

1 support the weight of the crane. This plan spared the expense of demolishing and replacing  
2 the parking structure.

3 A design idea called "Alternative F" was discussed at the June 15, 2006 meeting.  
4 (Ex. 2 to Bendele Decl. (Alternative F)) It called for the strength of the crane base to be  
5 supplemented by an initial tie-in brace between the crane mast and an adjacent structure,  
6 such as the building's concrete elevator core, approximately five stories above the crane base.  
7 The existence of the tie-in brace would eliminate the crane's "overturning moment" so the  
8 base itself did not have to. Thus the base itself could be much weaker if a tie-in were  
9 utilized, than it would need to be without one. LCL alleges that the Alternative F design was  
10 rejected because the building core was not high enough to provide a tie-in position for the  
11 crane in its initial assembly position. (Ex. 1 to Bendele Decl. (Willman Dep.) at p. 62:1-25)  
12 At the same time, however, LCL's Grant Willman admits that had he been more clear in his  
13 memo confirming the June 15, 2006 meeting, perhaps the miscommunication would not have  
14 occurred. (Ex. 1 to Bendele Decl. (Willman Dep.) at pp. 158-159:16-24 and 1-14.)

15 MKA's Doug Loesch states that based on the June 15, 2006 design meeting and his  
16 communications with LCL, he believed the building core would be built up by LCL such that  
17 Alternative F would be implemented when the crane was erected. Therefore, he designed a  
18 steel frame base assuming that the tower crane would exert no overturning moment on the  
19 base due to the tie-in. *Id.* at pp. 397-398:16-24 and 1-4.

20 Such a base could be designed to be weaker than a base that would not have the  
21 benefit of supplemental support from a tie-in brace. Mr. Loesch essentially contends that no  
22 one at LCL informed him that the tie-in would not be implemented on the tower crane in its  
23 initial assembly position. *Id.* at pp. 302-303:23-25 and 1-2. Consequently, MKA designed a  
24 crane base that required the installation of an initial tie-in brace to properly support the  
25 subject tower crane.

1           **3.     Erection Plans Indicated Crane was to be Freestanding and Without an**  
 2           **Initial Tie-In Brace**

3           LCL's Grant William testified that the plans provided to NWTC for the erection of the  
 4 crane, and the bid provided by NWTC to LCL, all indicated that that initial configuration of  
 5 the crane would be "free standing on foot anchor" and without the implementation of any tie-  
 6 in brace when erected. (Ex. 1 to Bendele Decl. (Willman Dep.) pp. 148-151:14-25, 1-25, 1-  
 7 25, and 1-25.) These were the plans distributed to NWTC by LCL and the crane's owner,  
 8 Morrow. Id. NWTC erected the crane according to the plans provided. (Weber Decl. at ¶  
 9 4.) NWTC had no idea an initial tie-in was contemplated by the engineer, it only knew what  
 10 the plans said. If the plans had called for an initial tie in, a completed different assembly  
 11 procedure would have been required, a different bid would have been written, assembly  
 12 would have taken two days, and NWTC would have had to charge LCL more to do the job.  
 13 Id. at at ¶ 15. And most glaringly, NWTC would have noticed that there was no five story  
 14 building core to attach the tie-in to. Id. LCL's Willman is not aware of anyone ever  
 15 providing NWTC with the Alternative F plans. (Ex. 1 to Bendele Decl. (Willman Dep.) p.  
 16 151:11-13.)

17           **4.     LCL and MKA Employees Confirm NWTC Not Involved with Design**

18           LCL's Grant William testified that NWTC did not have anything to do with the design  
 19 of the base or the construction of the base. (Ex. 1 to Bendele Decl. (Willman Dep.) p. 153:8-  
 20 25.) MKA's Doug Loesch confirmed that NWTC was not involved in designing the crane  
 21 base. (Ex. 3 to Bendele Decl. (Loesch Dep.) at p. 16:18-20.) Further, Mr. Loesch testified  
 22 that he did not "have any criticism or complaint whatsoever about the work performed by  
 23 [NWTC]." Id. at p. 15:11-15. Ms. Gretchen Humphrey also testified she had no criticism of  
 24 NWTC. (Ex. 4 to Bendele Decl. (Humphrey Dep.) p. 279:9-14.)

25           ///



1           **5. Experts Testify that NWTC Not Involved or Responsible for**  
 2           **Miscommunication between MKA and LCL**

3           Plaintiffs' expert Allan Hauck is the Department head of the Construction  
 4           Management Department at California Polytechnic State University. He was jointly retained  
 5           by the first-party plaintiffs. He testified that he believes the MKA-LCL miscommunication  
 6           caused the crane collapse. He further testified that, "I do not believe there was any  
 7           contribution from NWTC to that misunderstanding" (the [MKA-LCL] miscommunication).  
 8           (Ex. 5 to Bendele Decl. (Hauck Dep.) p. 80:4-14.) Expert Hauck further testified that he  
 9           believed NWTC was not responsible for the crane collapse at the Bellevue Tower 333  
 10          Project. *Id.* at. 81:17-20.

11          Plaintiff's construction-safety expert Kurt Stranne did not have any opinion that  
 12          NWTC violated any duties or standards of care. (Ex. 6 to Bendele Decl. (Stranne Dep.) p.  
 13          72:5-14.) Similarly, LCL's construction expert, John Putnam, did not have any opinion that  
 14          NWTC violated and duties, standards of care, or contributed to the cause of the crane  
 15          collapse. (Ex. 7 to Bendele Decl. (Putnam Dep.) pp. 154-155:17-25 and 1-2.)

16          **C. NWTC's Pre-Crane-Erection Involvement in the Tower 333 Project**

17           **1. "Base Tower" used as Template for Steel Base Two Weeks before Day of**  
 18           **Erection**

19          The "base tower" is the first mast section of the tower crane installed on the "crane  
 20          base." The names "base tower" and "crane base" can be confusing. The subject base tower  
 21          was manufactured by Liebherr, stands approximately 38 feet tall, and was painted yellow. It  
 22          is separate and distinct from the steel base designed by MKA, which is shaped like an "H"  
 23          and is reddish in color. (Weber Decl. at ¶ 8.) The base tower was delivered to the job site  
 24          while the MKA designed base was under construction to ensure the bolt hole pattern of the  
 25          base tower would properly match the bolt hole pattern being constructed on the steel base.

26          ///

1           **2.       NWTC Was Not Responsible for the Crane Base**

2           NWTC had no involvement in the design, manufacture, or installation of the crane  
3 base. (Ex. 1 to Bendele Decl. (Willman Dep.) p. 153:3-25; Ex. 8 to Bendele Decl. (Kragseth  
4 Dep.) p. 157:8-20; Ex. 9 to Bendele Decl. (Akre Dep.) pp. 94-95:20-25 and 1-17; Ex. 10 to  
5 Bendele Decl. (Weber Dep.) p. 32:6-19.) NWTC was not responsible to check the welding  
6 on the crane base foundation. (Ex. 11 to Bendele Decl. (Hagwood Dep.) p. 146:21-25.)  
7 NWTC was not responsible for determining whether additional inspection or testing of the  
8 crane base was required after the tower was assembled. (Ex. 8 to Bendele Decl. (Kragseth  
9 Dep.) p. 159:12-16.) LCL was responsible for constructing the tower crane base frame,  
10 sequencing and coordinating the design, construction, and inspection of the base foundation.  
11 Id. at pp. 156-157:7-25 and 1-19.

12           **3.       NWTC Had the Shims Manufactured based upon LCL's Measurements**  
13           **to Ensure its Base Tower was Level**

14           After the manufacture of the crane base was completed, LCL's on-site survey  
15 engineers measured or "shot the elevation" to make sure it was level. (Ex. 11 to Bendele  
16 Decl. (Hagwood Dep.) p. 121:8-25; Ex. 8 to Bendele Decl. (Kragseth Dep.) p. 164:1-19.)  
17 The data from the LCL survey engineers was then used to determine out how thick of shims  
18 were needed for the crane base. (Ex. 8 to Bendele Decl. (Kragseth Dep.) p. 164:13-19.) The  
19 information was provided to NWTC who had the shims manufactured by a fabrication shop.  
20 (Ex. 10 to Bendele Decl. (Weber Dep.) p. 47:3-24; Weber Decl. at ¶ 9.)

21           NWTC employee Eric McKenney installed the shims two days before the crane was  
22 erected and adjusted them pursuant to the instruction of the LCL surveyors until the base  
23 tower was plum. (McKenney Decl.) After NWTC installed the shims, the LCL surveyors  
24 determined that the shims were plumb and looked "good." (Ex. 8 to Bendele Decl. (Kragseth  
25 Dep.) pp. 165-166:1-25 and 1-11.) NWTC was not responsible for determining whether the  
26 base tower was plumb. Id. at p. 166:12-20. NWTC does not employ surveyors or structural

1 engineers and was not responsible for taking measurements of the crane base. (Ex. 11 to  
2 Bendele Decl. (Hagwood Dep.) p. 140:23-25; Ex. 8 to Bendele Decl. (Kragseth Dep.) p.  
3 157:12-20.)

4 **D. Tower Crane Assembly on September 9, 2006**

5 **1. Erection of the Mast of the Tower Crane**

6 The tower crane was assembled on Saturday, September 9, 2006. The crane was  
7 owned by Morrow and its representative, B.A. Phillips, was overseeing the erection process.  
8 Morrow provides the plans and jib configurations and NWTC assembles the crane according  
9 to the plans. NWTC employees are union ironworkers. They are not surveyors or engineers.  
10 NWTC had no engineer on its crew or staff. NWTC doesn't operate the crane. (Weber  
11 Decl.; Harr Decl.; Phinizy Decl.)

12 The NWTC crew divided into two groups. One group worked on the ground to  
13 unload the crane pieces from the delivery trucks and do preliminary assembly. The other was  
14 on the crane and attached the preassembled pieces to the crane as it was assembled. (Harr  
15 Decl.; Phinizy Decl.; Weber Decl.) After the crane's mast was erected, but before the  
16 counter jib was installed, LCL's surveying crew "shot" the tower again to ensure that it was  
17 plumb. (Ex. 12 to Bendele Decl. (Hagwood Dept. of L&I Transcript) pp. 566-568:2-25, 1-  
18 25, and 1-4.)

19 **2. Rotation of Counter-jib and Machine Deck Caused a Loud 'Popping'**  
20 **Noise to Occur at Crane Base**

21 Once the counter jib and machine deck were installed, the crane was rotated 180  
22 degrees to allow the front jib to be raised into position and attached. While the crane was  
23 rotating a loud popping sound was heard at the base. LCL's Kyle Kragseth ordered the  
24  
25  
26

1 NWTC team to come down from the crane, and halt the assembly. (Ex. 8 to Bendele Decl.  
2 (Kragseth Dep.) p. 169:10-14.)

3 **3. Inspection of the Crane Base after Popping Noise**

4 LCL was the general contractor and was responsible for the safety of the entire job  
5 site. (Ex. 8 to Bendele Decl. (Kragseth Dep.) p. 169:18-25.) LCL's Jon Hagwood was in  
6 charge that day. Representatives from Morrow, LCL, and NWTC gathered around the crane  
7 base and visually inspected the base. (Ex. 11 to Bendele Decl. (Hagwood Dep.) pp. 130-  
8 131:5-25 and 1-17.) LCL Employee Craig Harr stated that the crane base was so "odd" that  
9 no one at LCL knew how it was going to react. (Ex. 13 to Bendele Decl. (Craig Harr Dep.)  
10 pp. 126-127:2-25 and 1-4.) Various workers looked at the steel base and saw slip joints,  
11 grout pads, and some cracked plywood that had been used to build a form for the pouring of  
12 the grout pad. (Ex. 11 to Bendele Decl. (Hagwood Dep.) pp. 130-131:5-25 and 1-17.) The  
13 welds appeared to be intact and did not appear to have any defects when inspected by  
14 LCL's Craig Harr. (Jeff Harr Decl. at ¶ 9; Phinizy Decl. at ¶ 10; Ex. 13 to Bendele Decl.  
15 (Craig Harr Dep.) 127:2-4.)

16 **4. LCL States That the Base was Stamped by an Engineer and**  
17 **Purposefully Designed to Deflect**

18 There was concern regarding whether the crane base was designed properly. Dan  
19 Schaefer from NWTC spoke to who is assumed to be Jon Hagwood (a large African-  
20 American LCL superintendent). Schaefer expressed concern that the crane base had  
21 deflected. Another NWTC employee, Chad Peterson also expressed his opinion that  
22 something seemed amiss. (Ex. 14 to Bendele Decl. (Schaefer Dep.) p. 35:1-25.) Jon  
23 Hagwood told them the base was specifically designed to deflect. *Id.* at p. 33:2-19. He told  
24 Schaefer that, "We went to school for this and we know what were doing." Schaefer felt  
25 Hagwood was implying they were stupid. *Id.* at p. 35:18.24. Hagwood told the NWTC  
26 employees that the base had been designed by the engineer to move and that it was

1 functioning as designed. (Phinizy Decl. at ¶ 10-14; Ex. 14 to Bendele Decl. (Schaefer Dep.)  
2 p. 33:2-19.)

3 Another NWTC employee, William Phinizy, had a further conversation with a female  
4 LCL employee with blonde shoulder-length hair, about 5'6" tall, and average weight. He  
5 does not recall her name or title, but she appeared to be some sort of a design professional.  
6 He told her, as he had told Jon Hagwood, that he had concerns about the base deflection. She  
7 told Mr. Phinizy that she gets paid \$150,000 per year to design this stuff and that LCL knows  
8 what its doing. (Phinizy Decl. at ¶ 15.)

9 The Morrow representative, B.A. Phillips, was present at the base when Dan Schaefer  
10 demanded LCL have an engineer come look at the base before the crew re-ascended the  
11 crane. (Ex. 15 to Bendele Decl. (Phillips Dep.) p. 60:14-21). A thin Caucasian man with a  
12 white hard hat, who Phillips assumed was an engineer, examined the base while they ate  
13 lunch. *Id.* at 33-34:20-24. After lunch LCL employee Craig Harr told them that "nothing  
14 was found to be wrong" and they went back to work. *Id.* at 39-40:23-11.

##### 15 5. LCL Surveyors Measure Crane Base After Popping Noise

16 LCL surveyors measured the crane base after the popping noise. NWTC employee  
17 Gator Rasmussen assisted the LCL surveyors by holding a ruler in place as instructed. LCL  
18 assistant superintendent Craig Harr observed the process and states there was an elevation  
19 difference of one inch from beam to beam. (Ex. 13 to Bendele Decl. (Craig Harr Dep.) p.  
20 54:1-7.) Craig Harr knew MKA had engineered the base but did not attempt to call its  
21 engineers on a Saturday. He felt this task was Jon Hagwood's responsibility and left it to  
22 Hagwood to call MKA. *Id.* at 118:12-20. LCL's Jon Hagwood did call MKA and testified  
23 that he did not expect NWTC employees, workers who were not structural engineers, to  
24 verify that MKA had designed the crane base properly. (Ex. 11 to Bendele Decl. (Hagwood  
25 Dep.) p. 141:5-9.)  
26

1           **6. LCL's Hagwood Speaks with NWTC's Dave Weber: LCL Instructed to**  
 2           **have Crane Base Inspected by Engineer**

3           NWTC employees Jeff Harr and Dan Schaefer called NWTC president Dave Weber,  
 4           to advise him of what happened. Mr. Weber asked who was present, what had been found,  
 5           and what had been decided. LCL's Jon Hagwood and NWTC's Dave Weber then spoke on  
 6           the phone. (Ex. 11 to Bendele Decl. (Hagwood Dep.) pp. 131-132:24-25 and 1-24.; Weber  
 7           Decl.) Hagwood confirmed the base had been designed by an engineer. They agreed that the  
 8           crane was in a precarious position because it was very unbalanced. Attaching the front jib to  
 9           the crane would serve to balance out the crane. Dave Weber told Jon Hagwood that he  
 10          should call the engineers to inspect the base. (Weber Decl.)

11  
 12           **7. Jon Hagwood Made the Decision to Finish Assembly to Balance Crane**  
 13           **and Called MKA to Investigate**

14          Jon Hagwood gave the orders to continue assembly of the crane, because with the  
 15          weight of the counter-jib pushing the crane to lean to one side, the crane was in its most  
 16          vulnerable position of falling down at that point. (Ex. 13 to Bendele Decl. (Craig Harr Dep.)  
 17          p. 114:9-24; Ex. 8 to Bendele Decl. (Kragseth Dep.) pp. 174-175:4-25 and 1-14; Ex. 11 to  
 18          Bendele Decl. (Hagwood Dep.) pp. 133:6-17.) Dave Weber did not have authority over the  
 19          Project, and it was Jon Hagwood who supervised the crane assembly process at that point.  
 20          (Ex. 13 to Bendele Decl. (Craig Harr Dep.) pp. 116-117:16-25 and 1-20.) Additionally, Dave  
 21          Weber made no representation about whether the base was adequate before or after the  
 22          popping noise. (Ex. 13 to Bendele Decl. (Craig Harr Dep.) p. 118:6-11.)

23          That same day, immediately after the crane was assembled, Jon Hagwood called  
 24          Gretchen Humphrey, an MKA assistant structural engineer who was working with Doug  
 25          Loesch on the crane design team to discuss the loud "pop" which emanated from the crane  
 26          base. (Ex. 4 to Bendele Decl. (Humphrey Dep.) p. 261:6-13.) Mr. Hagwood requested that

1 someone from MKA come and inspect the crane base the following week. (Ex. 8 to Bendele  
2 Decl. (Kragseth Dep.) p. 177:6-25.)

3 **E. Activity After Tower Crane Assembly**

4 **1. MKA's Visual Inspection of the Crane Base After the Popping Noise**

5 At the request of LCL, MKA's Doug Loesch visually inspected the base the following  
6 week when he came to visit the site. (Ex. 8 to Bendele Decl. (Kragseth Dep.) p. 177:6-25.)  
7 Mr. Loesch never took any measurements of the base to see if the base comported with the  
8 calculated deflections. (Ex. 3 to Bendele Decl. (Loesch Dep.) p. 281:12-18.) Also, LCL did  
9 not conduct a comprehensive crane-base inspection. (Ex. 8 to Bendele Decl. (Kragseth Dep.)  
10 pp. 176-179:20-25, 1-25, 1-25, and 1-8.) MKA's Gretchen Humphrey told Kyle Kragseth  
11 that the base appeared normal and told LCL to repair the areas around the crane base where  
12 the grout had been broken on the day of assembly. *Id.* Incredibly, Mr. Loesch did not notice  
13 that there was no "Alternative F" tie-in to the crane and that there was no five-story building  
14 core to which the tie-in could be attached. (Ex. 3 to Bendele Decl. (Loesch Dep.) pp. 212-  
15 214:16-25, 1-25, and 1-16.)

16 **2. Morrow's Load Testing and Certification of the Crane**

17 Morrow conducted a load test two days after the crane was erected. (Ex. 13 to  
18 Bendele Decl. (Craig Harr Dep.), pp. 104:19-21.) NWTC's duties were simply to attach  
19 weights to the hook of the crane as directed by Morrow's technician. (Ex. 7 to Bendele Decl.  
20 (Putnam Dep.) pp. 155-156:3-25 and 1-10.) Morrow and LCL certified the crane for  
21 operation. B.A. Phillips signed for Morrow and Craig Harr signed for LCL. (Ex. 13 to  
22 Bendele Decl. (Craig Harr Dep.) pp. 104-105:22-25 and 1-9.; Exhibit 15 to Bendele Decl.  
23 (Morrow Crane Equipment Certificate)) Craig Harr understood the Certificate to mean that  
24 the load test had been performed to a specific standard with a Morrow technician on-site  
25 performing the test. (Ex. 13 to Bendele Decl. (Craig Harr Dep.) p. 105:14-17.) He also read  
26



1 and understood the purpose of the Certification before he signed it and stated he would have  
2 asked Jon Hagwood for clarification if he didn't. Id. at p. 105-106:18-25 and 1-8.

3 Paragraph 3 of the Certification applies to stationary cranes. It requires the lessee's  
4 representative to confirm that foundations were adequately installed and base section leveled.  
5 B.A. Phillips indicated that LCL was the lessee. (Ex. 16 to Bendele Decl. (Phillips Dep.), pp.  
6 85-86:2-25 and 1-2.) Even though the base was made of steel rather than concrete, Mr.  
7 Phillips indicates LCL still needed confirm it was adequately installed and level. Id.

### 8 **3. Crane Usage for Nine Weeks**

9 After the day of assembly, Jon Hagwood never followed up with NWTC regarding  
10 MKA's investigation of the foundation base after the loud popping noise because there was  
11 no concern with the crane base and thus nothing to report. (Ex. 11 to Bendele Decl.  
12 (Hagwood Dep.), pp. 137:2-21). If MKA had told Mr. Hagwood that NWTC needed to do  
13 some additional work or modification to the crane because of the condition of the steel  
14 foundation, Mr. Hagwood would have told NWTC to do it. Id. at p. 138:7-12. Mr. Hagwood  
15 did not call NWTC to come back and do any work or modification to the crane after speaking  
16 with MKA about their visual inspection. Id. at p. 138:13-22. After the crane was assembled,  
17 NWTC left the site, and had no responsibility to measure the base or conduct testing. Id. at  
18 p. 147:11-18. The crane was used for nine weeks before collapsing.

### 19 **4. LCL Employees Testify NWTC did Nothing Wrong and Did Not Violate** 20 **its Contractual Duties**

21 LCL's Senior Project Superintendent Jon Hagwood testified that he had no complaints  
22 with the work performed by NWTC. Id. at p. 147:19-24. He stated, "I have a lot of respect  
23 for Weber and his crew. I think they are professionals in the industry. I've worked with them  
24 for years and think they are true professionals." Jon Hagwood's replacement, Scott Akre,  
25 testified that he was not aware of any manner in which NWTC's work did not comply with  
26 its contract. (Ex. 9 to Bendele Decl. (Akre Dep.), p. 92-93:9-25 and 1-22.) He further



1 explained that if NWTC's work did not comply with its contract, he would have notified  
 2 NWTC in a writing that identified any non-conforming issues. This did not occur. Id.

### 3 **III. ISSUES PRESENTED**

4 Should the court dismiss all claims against NWTC because plaintiffs have failed to  
 5 provide evidence or testimony that shows NWTC was a cause or proximate cause of the  
 6 tower crane collapse?  
 7

### 8 **IV. EVIDENCE RELIED UPON**

9 The Declarations of David Weber, Jeff Harr, William Phinizy, Eric McKenney, and the  
 10 Declaration of Levi Bendele with the following Exhibits:  
 11

- 12 **Exhibit 1:** Deposition Transcript of Grant Willman (LCL)
- 13 **Exhibit 2:** Alternative "F" Plans
- 14 **Exhibit 3:** Deposition Transcript of Doug Loesch (MKA)
- 15 **Exhibit 4:** Deposition Transcript of Gretchen Humphrey (MKA)
- 16 **Exhibit 5:** Deposition Transcript of Allan Hauck (Four Plaintiffs)
- 17 **Exhibit 6:** Deposition Transcript of Kurt Stranne (Four Plaintiffs)
- 18 **Exhibit 7:** Deposition Transcript of John Putnam (LCL)
- 19 **Exhibit 8:** Deposition Transcript of Kyle Kragseth (LCL)
- 20 **Exhibit 9:** Deposition Transcript of Scott Akre (LCL)
- 21 **Exhibit 10:** Deposition Transcript of Dave Weber (NWTC)
- 22 **Exhibit 11:** Deposition Transcript of Jonathon Hagwood (LCL)
- 23 **Exhibit 12:** Deposition Transcript of Jonathon Hagwood from Department of L & I  
 (LCL)
- 24 **Exhibit 13:** Deposition Transcript of Craig Harr (LCL)
- 25 **Exhibit 14:** Deposition Transcript of Dan Schaefer (NWTC)
- 26 **Exhibit 15:** Morrow Equipment Crane Certificate (including readable Exemplar)
- Exhibit 16:** Deposition Transcript of Buford Phillips

1 them have any issues with the work NWTC performed. MKA employees Loesch and  
 2 Humphrey both testified they have no issues with the work NWTC performed. Plaintiffs'  
 3 construction-management expert (Hauck) and construction-safety expert (Stranne) have no  
 4 issues with the work NWTC performed. LCL's construction expert Putnam has no issues  
 5 with the work NWTC performed.

6 Neither LCL, MKA, nor the Plaintiffs retained a crane expert to testify regarding the  
 7 standard of care applicable to a tower-crane erection company. (LCL did disclose a rebuttal  
 8 expert.) This is highly irregular in a \$20+ million lawsuit involving the collapse of a crane  
 9 where a crane-erection company has been sued. Perhaps they did speak to consulting crane  
 10 experts, but decided against disclosing any such experts when they were told NWTC did  
 11 nothing wrong?  
 12

13 This Court has given LCL, MKA, and the Plaintiffs more than enough time to  
 14 develop material facts that show NWTC caused or contributed to the collapse. None have  
 15 been uncovered. Summary judgment dismissal is proper and justice requires NWTC, its  
 16 employees, and their families not be put through the expense and emotional toll of a 4-6  
 17 week liability trial.  
 18

19 DATED this 23<sup>rd</sup> day of February, 2009.

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